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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 185

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK,

Petitioner,

vs.

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 185

IN THE MATTER OF THE CLAIM FOR BENEFITS UNDER ARTICLE 18 OF THE LABOR LAW OF THE STATE OF NEW YORK, MADE BY SYLVIA PERRY,

Claimant-Petitioner.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK,

Petitioner,

against

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above-named Frieda S. Miller, as Industrial Commissioner of the State of New York, and Sylvia Perry, claimant, petitioners herein, pray for a writ of certiorari to review the order, decision and judgment of the Court of Appeals of the State of New York, being the court of

last resort of that State, reversing a final order of the Supreme Court of the State of New York, Appellate Division, Third Department, and annulling the decision of the Unemployment Insurance Appeal Board of the State of New York (record—remittitur of Court of Appeals of New York). The order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court of the State of New York, Appellate Division, Third Department, by the filing of the remittitur of said court with the Clerk of the Supreme Court, Appellate Division, Third Department, on the 27th day of March, 1942, and the entry of the judgment and order of the Supreme Court, Appellate Division, Third Department, on the same date. Copies of the orders and judgments are included with the record at pp. 39-51.

The opinion of the Court of Appeals sought to be reviewed was handed down on March 5, 1942, and appears in the record, pages 46-49. The remittitur was issued to the Supreme Court, Appellate Division, Third Department, March 6, 1942. By the judgment and remittitur, the Court of Appeals reversed the order of the Supreme Court, Appellate Division, Third Department, and annulled the decision of the Unemployment Insurance Appeal Board, basing its decision on the determination that under the terms of the Perishable Agricultural Commodities Act of 1930 (U. S. C. A., Title 7, Ch. 30-A) and the agreement made in this case between the respondent and the United States Department of Agriculture, one Sylvia Perry was employed not by the respondent but by the said Department of Agriculture and, as such, an employee of the Federal Government and, therefore, not eligible for unemployment insurance benefits within the purview of Article 18 of the Labor Law of the State of New York on the grounds that she had not worked during the calendar year 1938 for an employer subject to the provisions of the New York Unemployment Insurance Law.

The determination was necessarily based on the construction and interpretation of the Federal statute, namely, the Perishable Agricultural Commodities Act of 1930.

Summary Statement of the Matter Involved.

The respondent is a membership corporation organized under the laws of the State of New York, and its members are dealers in fruits and vegetables (R. 16). This merchandise is purchased by the various members of the respondent in carload lots from shippers in different states of the Union (R. 16-17). Because of the perishable nature of the merchandise, it frequently arrives at its destination, namely, the City of New York, in a damaged condition (R. 20).

In order to provide for an impartial inspection of the condition of the merchandise upon its arrival in the city, and the condition of the cars in which the merchandise was shipped, the respondent, on August 1, 1933, entered into an agreement with the Bureau of Agricultural Economics of the United States Department of Agriculture (Employer's Exhibit "B" received in evidence, R. 19, 22, and appearing R. 33-36), whereby that bureau agreed as follows:

It will select, train, license and supervise inspectors whose duties shall be to inspect the merchandise shipped to all the members of the association. The inspection is to be made in the car wherever practicable in order to determine before the car is unloaded the nature, extent and location of any damage which may be evident and to note any material defects in the car or equipment. The bureau will then furnish to the association or the individual member who is the receiver of the car in question, an original and two carbon copies of a certificate describing the condition of the merchandise and of the car or equipment. This service is to be rendered to the association and its members only and shall not be available to any other parties.

The association and its individual members agree that all merchandise received in carloads shall be inspected by the

inspectors of the bureau to be appointed by the supervising inspector for that purpose. The inspectors to be appointed for this purpose together with the necessary clerks and other personnel shall be paid by the association from a fund to be established for that purpose. The members of the association will pay $2.00 per car for every inspection, plus an amount sufficient to cover the general overhead of the bureau.

In order to guarantee the initial salaries of the inspectors, clerks and supervisors engaged in the work, the association provided a working fund of $3,000, which was deposited in a special fund created for that purpose. The association agreed that the supervising inspector of the bureau shall have the sole right to appoint inspectors, clerks and other members of the personnel. The association further promised not to interfere with the work of the inspectors and to file all complaints with respect to the inspection with the supervising inspector of the bureau. The object of the last two provisions is to guarantee the impartiality of the inspection (R. 17, 33-36).

In accordance with the provisions of this contract, the supervising inspector of the Bureau of Agricultural Economics appointed inspectors, clerks and other personnel. The bureau billed individual members for the services rendered to them. Checks and other remittances when received were turned over by the bureau to the treasurer of the respondent who deposited same in the special fund. The supervising inspector prepared a payroll every two weeks, which was sent to the treasurer of the respondent who issued checks therefor to the respective members of the personnel. When the special fund exceeded $3,000 the excess was refunded by the respondent pro rata among its members (R. 17-18, 23, 26-27, 33).

The respondent maintained a workmen's compensation policy for the benefit of the inspectors rendering services

in inspecting the merchandise shipped to its members (R. 24, 30). This inspection is not required by any law of the United States, or by any rule of the Department of Agriculture (R. 17, 20). *The service is rendered by the bureau for the private benefit and advantage of the respondent and its members* (R. 29, 34).

There were at least four persons employed either as inspectors or as clerks in rendering services to the respondent herein for thirteen weeks during the year 1935 (R. 15). Sylvia Perry was employed as a clerk in rendering services to the respondent (R. 14). Following the termination of her employment (R. 14) she applied for unemployment insurance benefits from the State of New York, based on her earnings in 1938. Her period of employment and the amount of her earnings are not in dispute. She received $25.00 per week every week during 1938 from the respondent (R. 33, 37).

All the expenses of the inspection services are borne by the respondent (R. 33). When Sylvia Perry was hired she was not selected from any governmental list or civil service list (R. 25). The clerical force is hired either from personal knowledge or from recommendations of individuals or from agencies such as typewriter employment agencies. No civil service requirements are invoked (R. 25). No pension deduction is made from their salaries and they are not required to belong to any retirement fund (R. 25).

Sylvia Perry was recommended by a *civil service employee in the bureau* and hired after she was given a typing test (R. 28). Employees of members of the respondent have recommended the hiring of certain individuals (R. 28).

There is no proof in this record that the inspectors could hire the clerical services of Sylvia Perry on behalf of the United States.

An Unemployment Insurance Referee, after holding hearings on the claim for unemployment insurance benefits

filed by Sylvia Perry, made his decision that Sylvia Perry was an employee of the United States Department of Agriculture, and as such employee, did not work in employment subject to the Unemployment Insurance Law of the State of New York (R. 11).

The Unemployment Insurance Appeal Board of the State of New York reversed the referee's decision and held that the respondent, and not the Department of Agriculture, was the employer of Sylvia Perry, and that Sylvia Perry was entitled to be credited with her earnings with the respondent, who was subject to the Unemployment Insurance Law (R. 6). The respondent thereafter appealed from the decision of the Board to the Supreme Court, Appellate Division, Third Department. The Appellate Division, in a four to one decision, affirmed the decision of the Unemployment Insurance Appeal Board. The opinion for affirmance was written by Hill, P. J. Mr. Justice Crapser dissented and voted to reverse the decision of the Board and to reinstate the decision of the referee. The decision of the Appellate Division and the opinion for affirmance are found at folios 190-202. The respondent thereupon appealed to the Court of Appeals which unanimously reversed the said order of the Appellate Division with an opinion written by Lehman, Ch. J., reported in 287 N. Y. 539, at pp. 541-544. The opinion written in the Court of Appeals by Chief Judge Lehman, and the opinion written in the Supreme Court, Appellate Division, Third Department, by Presiding Justice Hill are in th record at pages 46 and 41. The opinion of Chief Judge Lehman, concurred in by the other Judges of the Court of Appeals, is based upon the ground that Sylvia Perry was not an employee of the respondent but was an employee of the Federal Government by reason of the provisions of the Perishable Agricultural Commodities Act of 1930 and the memorandum agreement entered into be-

tween the respondent and the Bureau of Agricultural Economics of the Department of Agriculture.

Question Presented.

A substantial Federal question is involved, namely, whether Sylvia Perry was an employee of the Federal Government or an employee of the respondent. If she was an employee of the former, then she is not entitled to unemployment insurance benefits of the State of New York, and the State of New York may not collect an unemployment insurance tax upon her earnings. If she is an employee of the respondent, then she is entitled to unemployment insurance benefits, and the State of New York may collect unemployment insurance taxes from the respondent.

Jurisdiction.

The jurisdiction of this Court is invoked under § 237 of the Judicial Code of the United States (28 U. S. C. A. § 344, subd. b), to correct error of the Court of Appeals of the State of New York, the Court of last resort in that State.

The Reasons Relied Upon for Allowance of the Writ.

It is respectfully submitted by your petitioners and relied upon as reasons for granting of the writ that:

(A) The Court of Appeals of the State of New York has construed a Federal statute, viz., Perishable Agricultural Commodities Act of 1930 (U. S. C. A. Title 7, Ch. 30-A), and a memorandum of agreement entered into as provided for in that Act, to mean that the necessary clerks employed in the office of the Bureau of Agricultural Economics, Department of Agriculture, engaged in providing inspection service rendered to the respondent, are employees of the United States Government, thus and thereby relieving the respondent from payment of the unemploy-

ment insurance tax to the State of New York upon the remuneration paid by it to such clerks, and depriving such clerks, including claimant-petitioner herein, from the benefits of the Unemployment Insurance Law of the State of New York.

(B) That the decision of the Court of Appeals of the State of New York is one of first impression involving the construction and application of recently enacted Federal legislation of direct concern to the administration of the Unemployment Insurance Law, not only in the State of New York but in all other jurisdictions which have Unemployment Insurance Laws.

(C) That the Court of Appeals of the State of New York has decided the question interpreting a Federal statute which differs from rulings by the United States Department of Agriculture made on or about November 21, 1941 and by the Bureau of Internal Revenue, made December 18, 1941, to the effect that inspectors (other than a supervising inspector), typists and other personnel employed under the inspection agreement herewith concerned, and the respondent herein are subject to the taxes imposed by Titles VIII and IX of the Social Security Act and sub-chapters A and C of Chapter 9 of the Internal Revenue Code and amendments thereto.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, Appellate Division, Third Department, and to the Court of Appeals of the State of New York, commending the said courts to certify and to send to this Court for its review and determination as provided by law, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case,

entitled "In the Matter of the Claim for Benefits under Article 18 of the Labor Law, made by Sylvia Perry, Claimant, Western Perishable Carload Receivers Ass'n of New York, Inc., Employer-Appellant, Frieda S. Miller, as Industrial Commissioner, Respondent," and that the said order and judgment of the Court of Appeals of the State of New York may be reversed by this Honorable Court, as prayed for by Petitioners, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just. A certified copy of the record in the courts below is submitted herewith in support of this petition.

June 22, 1942.

Respectfully submitted,

SYLVIA PERRY,
Claimant-Petitioner.

FRIEDA S. MILLER,
Industrial Commissioner of the State of New York, Petitioner.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York, Attorney for the Petitioner, Frieda S. Miller, as Industrial Commissioner of the State of New York.

HENRY EPSTEIN,
Solicitor General, State of New York, Counsel for Petitioner, Frieda S. Miller, as Industrial Commissioner of the State of New York.

WILLIAM GERARD RYAN,
FRANCIS R. CURRAN,
Assistant Attorneys General,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 185

IN THE MATTER OF

THE CLAIM FOR BENEFITS UNDER ARTICLE 18 OF THE LABOR LAW OF THE STATE OF NEW YORK, MADE BY SYLVIA PERRY,

Claimant-Petitioner,

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK,

Petitioner,

against

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The opinion of the Supreme Court, Appellate Division, is reported in 261 App. Div. 739, and is to be found at page

66 of the record. The opinion of the Court of Appeals is reported in 287 N. Y. 539, and is to be found at page 46 of the record.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under § 237 of the Judicial Code of the United States (28 U. S. C. A., § 344, subd. b), to correct error of the Court of Appeals of the State of New York, the court of last resort in that State.

III.

Statement of the Case.

The essential facts of the case herein are stated in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated herein.

IV.

Specification of Errors.

The Court of Appeals of the State of New York erred in the following particulars:

1. In holding that Sylvia Perry, the claimant, was as a matter of law, because of the provisions of the Federal statute, an employee of the Department of Agriculture and not an employee of the respondent.

2. In reversing the order of the Supreme Court, Appellate Division, which had affirmed the decision of the Unemployment Insurance Appeal Board of the State of New York that the respondent was the employer of the claimant and that claimant was entitled to be credited with her earnings with respondent for the year 1938.

V.

Argument and Authorities in Support of Petition.

Summary of the Argument.

Point A

The New York Court of Appeals did not properly apply the provisions of the Perishable Agricultural Commodities Act of 1930, Title 7, U. S. C. A., Ch. 20-A, § 499, subds. (n) and (o), since the claimant, Sylvia Perry, was not an employee of the Department of Agriculture referred to in that statute, but a typist employed by respondent corporation.

Point B.

A substantial Federal question is involved since the Department of Agriculture and the Bureau of Internal Revenue have issued rulings which are contrary to the decision of the New York Court of Appeals.

Point A.

This Court should issue the writ in order to inquire whether the State Court has rightly applied the Federal Statute, the contract between the respondent and the Department of Agriculture and the rules of the law of master and servant in determining whether a claimant for unemployment insurance benefits in the State of New York was an employee of the United States or of a New York corporation during the calendar year 1938.

Claimant's earnings in employment subject to the New York Unemployment Insurance Law for the year 1938 governed the total amount of benefits payable during the benefit year 1939 (New York Labor Law § 507, subd. 1). Claimant maintains that her earnings of $325.00 in each of

the four calendar quarters during 1938 should be included in her 1938 earnings (R. 12).

If the claimant herein during 1938 was an employee of the United States, then we concede that her earnings from the Federal Government do not constitute remuneration as defined in § 502, subd. 6, of the New York Labor Law, since the State of New York may not impose a tax upon the United States based on such earnings. If, however, the claimant herein during 1938 was an employee of the respondent, then her earnings with it during 1938 are taxable by the State of New York and may be included as earnings in employment subject to the Unemployment Insurance Law.

The facts in the record sufficient to prove that Sylvia Perry was during 1938 an employee of the respondent have been set out in the petition under "Summary Statement of the Matter Involved" to which we respectfully refer the court.

The control over the activities of the employees of the respondent (such as the claimant herein) exercised by the inspectors occurs because the respondent requires its employees to conform to the discipline of the inspectors. This is an exercise of the respondent's right of control over its employees and does not convert its employees into employees of the United States. Claimant was paid from private funds and not from government sources. See *Standard Oil Co.* v. *Anderson,* 212 U. S. 215; *In re Batter,* 257 App. Div. 546, aff'd 282 N. Y. 722; *In re Kinney,* 257 App. Div. 496, aff'd 281 N. Y. 840; *Buckstaff Bath House Co.* v. *McKinney,* 308 U. S. 358, 60 S. Ct. 279.

The opinion of the lower court held (R. 42):

> "* * * This employee had none of the benefits incident to employment by the United States government, she was not permitted to be a member of the retirement system, she worked for the benefit of the Asso-

ciation, and received her pay from a fund made up by its members. Her selection by the Federal Bureau for the reason outlined did not affect the relation of employer and employees that existed between her and the Association."

In *Denton* v. *Yazoo & Mississippi Valley Railroad Company, et al.*, Respondents, 284 U. S. 305, this court granted a writ of certiorari where the question was whether Jim Hunter was a servant of the railroad company or of the United States Government at the time of the injury sustained by him. In the *Denton* case, *supra,* the question sought to be reviewed was whether the State court had rightly applied the provisions of the United States Postal Laws and Regulations in arriving at its decision. The question raised by your petitioners herein is whether the State court has rightly applied the provisions of the Perishable Agricultural Commodities Act of 1930, Title 7 U. S. C. A., Ch. 20-A, §§ 499 (a) to (r). Section 499 (n) thereof reads, in part, as follows:

> "Inspection of perishable agricultural commodities; employment of inspectors; fees for and expenses of inspection; travel and subsistence of inspectors; certificates of inspectors as evidence; issuance of fraudulent certificates; penalty
>
> "(a) The Secretary is hereby authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this chapter, to any interested person the class, quality and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may

prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided*, That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further*, That expenses for travel and subsistence incurred by inspectors shall be paid by the applicant for inspection to the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this chapter: *And provided further*, That official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under sections 1 to 17 (a) of this title, as prima-facie evidence of the truth of the statement therein contained; * * *"

Section 499, subd. (o) of the same Act provides:

"The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, binding, telegrams, telephones, law books, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and ex-

penses, including reporting services, as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto. June 10, 1930, c. 436, § 15, 46 Stat. 537."

POINT B.

The writ should be granted because a substantial Federal question is involved.

The United States Department of Agriculture on or about November 21, 1941, issued a ruling that the inspectors (other than the supervising inspector) and typists in question employed under the inspection agreement referred to in the record as employer's exhibit "B," pages 48-54, are not employees of the Department of Agriculture.

The Bureau of Internal Revenue under date of December 18, 1941, issued a ruling to the effect that the inspectors (other than the supervising inspector), typists and other personnel employed under the inspection agreement, which is printed in the record as employer's exhibit "B," pages 48-54, and the Western Perishable Carload Receivers Association of New York, Inc., Respondent, are subject to the taxes imposed by Titles VIII and IX of the Social Security Act and sub-chapters A and C of chapter 9 of the Internal Revenue Code and amendments thereto.

Thus we have presented the anomalous situation of the Court of Appeals of the State of New York holding that the

claimant herein was an employee of the United States Department of Agriculture, and the Department of Agriculture and the Bureau of Internal Revenue holding that she was an employee of the respondent herein and not an employee of the Federal Government.

We submit that while the number of persons affected by the Court of Appeals' decision may be comparatively small in New York State, nevertheless, a substantial Federal question is presented which should be reviewed by this Court, in view of the fact that throughout the entire nation this decision will affect several thousands of persons employed under similar agreements with the United States Department of Agriculture. Our research has failed to disclose that any court except the Court of Appeals of the State of New York has passed upon the question presented herein.

In *Standard Oil Company of California* v. *Charles G. Johnson, as Treasurer of the State of California,* — U. S. —, decided on June 1, 1942, this Court reversed the California court which had held that an army post exchange was subject to the California Motor Vehicle Fuel License Tax Act on the ground that army post exchanges were not "the government of the United States or any department thereof," and consequently not exempt from tax. This Court in reversing the California court specifically ruled that "post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it and partake of whatever immunities it may have under the Constitution and Federal statutes. In concluding otherwise the Supreme Court of California was in error."

We submit, therefore, that this Court likewise should review the question involved herein, whether the claimant,

Sylvia Perry, was employed by the respondent or Federal Government.

Conclusion.

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory power. The subject matter of this petition is of great importance because it affects the status of many persons employed under similar conditions as the claimant herein, and further, affects the proper administration of the Unemployment Insurance Law, not only in the State of New York, but in other jurisdictions having similar statutes.

If the conflict in opinion between the Department of Agriculture and the Bureau of Internal Revenue on the one hand, and the Court of Appeals' decision on the other continues to exist, we shall have a situation presented of the Federal government imposing Federal taxes on the respondent and the claimant because of their rulings that such employees are employees of the respondent and not of the United States; and the State of New York prevented from collecting State taxes from the respondent because of this decision of its highest court, holding in effect that the claimant was an employee of the United States and, therefore, the respondent is not liable for the unemployment insurance taxes to the State of New York measured by the wages paid to the claimant.

Furthermore, while the claimant, pursuant to the said Federal rulings is liable for the payment to the Federal government of the taxes imposed by the Federal Insurance Contributions Act (42 U. S. C. A. § 1001), by virtue of the Court of Appeals' decision herein, she is not entitled to unemployment insurance benefits based on the same services rendered on the theory that she is an employee of the United States.

We respectfully pray that this Honorable Court take jurisdiction in the premises herein and grant the writ of certiorari as herein prayed for.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the State of New York, Attorney for Petitioner, Frieda S. Miller, as Industrial Commissioner of the State of New York.

HENRY EPSTEIN,
Solicitor General of the State of New York, Counsel for Petitioner, Frieda S. Miller, as Industrial Commissioner of the State of New York.

WILLIAM GERARD RYAN,
FRANCIS R. CURRAN,
Assistant Attorneys General of the State of New York, of Counsel.

APPENDIX.

Provisions of Article 18 of the Labor Law of New York Pertinent to This Case.

(Ch. 142, L. of 1937; Ch. 10, 265, 266, L. of 1938.)

Section 502. Definitions. As used in this article:

1. "Employment," except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer, in which all or the greater part of the work is to be performed within this state.

But for the purposes of this article, "employment" shall not include:

(1) Employment as a farm laborer; or

(2) Employment by an employer of his spouse or minor child.

2. "Employee" means any person, including aliens and minors, employed for hire by an employer in an employment subject to this article, except that for all or part of any calendar year prior to January first, nineteen hundred thirty-eight no person shall be deemed an employee for any of the purposes of this article if during such calendar year he was paid by his employer or employers remuneration for employment amounting to more than three thousand dollars.

3. "Employer" means any person, partnership, firm, association, public or private, domestic or foreign corporation, the legal representatives of a deceased person, or the receiver, trustee or successor of a person, partnership, firm, association, public or private, domestic or foreign corporation, who or whose agent or predecessor in interest has employed at least four persons in any employment subject to this article, providing however, that:

(1) Employment of such persons within each of thirteen or more calendar weeks in the year nineteen hundred thirty-five shall make an employer subject to this article on and after January first, nineteen hundred thirty-six.

(2) Employment of such persons within each of thirteen or more caelndar weeks in the year nineteen hundred thirty-six by an employer not already subject to this article shall make such employer subject hereto on and after January first, nineteen hundred thirty-six.

(3) Employment of four or more such persons within each of fifteen or more days within any calendar year after December thirty-first, nineteen hundred thirty-six, by an employer not already subject to this article shall make such employer subject hereto on and after the first of the fifteen days within which such employment occurs.

(a) Whenever any helper, assistant or employee of an employer engages any other person in the work which said helper, assistant or employee is doing for the employer, such employer shall for all purposes hereof be deemed the employer of such other person, whether such person is paid by the said helper, assistant or employee, or by the employer, provided the employment has been with the knowledge, actual, constructive or implied, of the employer.

(b) In determining whether an employer is subject to this article, and in determining for what contributions he is liable hereunder, such employer shall, whenever he contracts with any person for any work which is part of such employer's usual trade, occupation, profession or enterprise be deemed to employ all employees employed by such person for such work and he alone shall be liable for the contributions hereunder with respect to wages paid to such employees for such work unless such person performs work or is in fact actually available to perform work for anyone who may wish to contract with him and is also found to be engaged in an independently established trade, business, profession or enterprise.

(c) All persons thus employed by an employer (of any person) within the state, in all of his several places of em-

ployment maintained within the state, shall be treated as employees of a single employer for the purpose of this article, excepting, however, persons employed in personal or domestic service in private homes, and with respect to such persons, an employer shall not be subject to this article unless he has employed a total in all the several places of such personal or domestic service maintained by him within the state of at least four such persons within the several periods and under the conditions above provided in this subdivision.

(d) The state of New York, municipal corporations and other governmental subdivisions, and any corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, shall not be employers subject to this article.

(e) Any employer who has once become subject to this article shall cease to be subject hereto as of the first day of January of any calendar year only after a written application by him made not later than the thirty-first day of January of such year and after a finding by the commissioner that he has not within any fifteen days in the preceding calendar year, employed four or more persons in any employment subject hereto.

(f) Any employer (of any person within the state) not otherwise subject to this article shall become fully subject hereto, upon filing by such employer with the commissioner of his election to become fully subject hereto for not less than two calendar years, subject to written approval of such election by the commissioner. Such an employer shall continue to be subject hereto for successive periods of two calendar years each unless he files with the commissioner a written notice of his intent to terminate his liability hereunder not later than thirty days before the expiration of any such two-year period.

4. "Fund" means the unemployment insurance fund created by this article.

5. "Benefit" means the money allowance payable to an employee as provided in this article.

6. "Remuneration" shall mean every form of compensation for employment paid to an employee by his employer, whether paid directly or indirectly by the employer, including salaries, commissions, bonuses, and the reasonable money value of board, rent, housing, lodging or similar advantage received. Where gratuities are received by the employee in the course of his employment from a person other than his employer, the value of such gratuities shall be determined by the commissioner and be deemed and included as part of his remuneration paid by his employer.

6-a. "Wages" shall mean the first three thousand dollars of remuneration paid to an employee by each of his employers with respect to employment during any calendar year.

7. "Payroll" shall mean all wages paid by an employer to his employees as defined in subdivision two of section five hundred and two herein.

8. "Base year" means the calendar year immediately preceding the beginning of a benefit year. But if within the calendar year an employee has not been paid wages equal to at least eighteen times his benefit for a week of total unemployment, "base year" with respect to such employee shall mean the first four of the last five completed calendar quarters immediately preceding the first day of any week in the current benefit year with respect to which a claim to benefits has been made by such employee.

8-a. "Benefit year" means the period from April first of each successive calendar year to and including March thirty-first of the next subsequent calendar year.

9. "Full-time weekly wages" shall be determined as follows:

With respect to each employee, there shall first be ascertained the highest weekly wages paid to such employee within each calendar quarter of his base year; of the four amounts thus obtained. The largest and smallest shall be

excluded, and the average of the two middle amounts shall be deemed such employee's full-time weekly wages; provided that, for an employee to whom wages have been paid within only two calendar quarters during his base year, his full-time weekly wages shall be the average of the highest weekly wages paid to him within each of the two calendar quarters, and for an employee to whom wages have been paid in only one calendar quarter during his base year, his full time weekly wages shall be the highest weekly wages paid to him in such calendar quarter. In any case, however, where there is a fixed rate of wages for a day, week or longer payroll period full-time weekly wages shall be the weekly equivalent of such rate. The commissioner may make such rules and adopt such methods of calculating full-time weekly wages as may be suitable and reasonable under this article.

10. "Total unemployment" means the total lack of any employment, including employment not subject to this article, together with the total lack of all compensation during a period of seven consecutive calendar days, both of which are caused by the inability of an employee who is capable of and available for employment to obtain any employment in his usual employment or in any other employment for which he is reasonably fitted by training and experience, including employments not subject to this article. Where an employee's compensation for employment or employments, including employments not subject to this article, does not in the aggregate exceed two dollars for a period of seven consecutive calendar days, such employment or employments and the compensation therefor shall be disregarded in determining whether there is "total unemployment" with respect to such employee.

Section 515. Payment of Contributions.

1. On and after the first day of January, nineteen hundred thirty-six, contributions shall be payable by each employer then subject to this article. Contributions shall become payable by any other employer on and after the date on which he becomes subject to this article.

2. All contributions from employers shall be paid at such times and in such manner as the commissioner may prescribe, but in no event shall any contribution be paid prior to March first, nineteen hundred thirty-six.

3. All contributions paid under this article, together with the interest and the earnings thereon and any penalties, shall upon collection be deposited in or invested in the obligations of the "Unemployment Trust Fund" of the United States government or its authorized agent, so long as said trust fund exists, notwithstanding any other statutory provision to the contrary. The commissioner shall requisition from the unemployment trust fund necessary amounts from time to time.

4. The exemption from taxation granted to fraternal benefit societies under the provisions of section two hundred and forty-six of chapter thirty-three of the laws of nineteen hundred nine, entitled "An Act in relation to insurance corporations, constituting chapter twenty-eight of the consolidated laws," as added by chapter one hundred and ninety-eight of the laws of nineteen hundred eleven, shall not be so construed as to apply to the payment of contributions under this article.

SECTION 516. CONTRIBUTIONS TO THE UNEMPLOYMENT INSURANCE FUND.

The contribution regularly payable by each employer shall be an amount equal to three per centum of the payroll of employees, as herein defined, except that the contribution payable by each employer for the calendar year nineteen hundred thirty-six shall be an amount equal to one per centum of such payroll and for the year nineteen hundred thirty-seven shall be an amount equal to two per centum of such payroll.

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No. 185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York,

Petitioner,

against

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC., IN OPPOSITION

TOLBERT, EWEN & PATTERSON,
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August, 1942.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 185

In the Matter of the Claim for Benefits Under Article 18 of the Labor Law of the State of New York, made by SYLVIA PERRY,

Claimant-Petitioner.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York,

Petitioner,

against

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION

BRIEF FOR THE WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC., IN OPPOSITION

Opinion Below

The opinion of the Court below is reported in 287 N. Y. 539 (R. 46).

Jurisdiction

The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code of the United States [28 U. S. C. A., Section 344, subdivision (b)]. Respondent claims that no jurisdiction exists.

Question Presented

Whether the respondent is an employer of the claimant-petitioner within the meaning of Article 18 of the Labor Law of New York (McKinney's Consolidated Laws of New York, Volume 30, Sections 500, et seq.)

Statute Involved

The pertinent portions of the statute involved will be found in the Appendix of petitioner's brief.

Statement

The respondent is a membership corporation organized under the Laws of the State of New York and is composed of dealers in fruits and vegetables who as individuals had been unable to obtain certificates of inspection from the Government as to the condition on arrival of merchandise shipped to them, and for this reason formed a corporation (R. 16, 17). The respondent for the purpose of obtaining Federal inspection of the merchandise received by its members (R. 33), then entered into an agreement (R. 33, Employer's Exhibit B received in evidence, R. 19, 22) with the Bureau of Agricultural Economics of the Department of Agriculture whereby it was to secure the signature of all of its members to contracts for the inspection of their tonnage at the rate of $2 per car, which money was to be deposited in a special fund from which payment of expenses was to be made on vouchers initialed or submitted by a Federal inspector (R. 33). Only such payments were to be made from this fund as were certified by the inspector to be essential (R. 33). "To guarantee the salaries" of the inspectors and other employees under this agreement for the first month, the Association agreed to deposit $3,000 (R. 34) and to pay the cost and expenses of this service plus 15 cents for each

car inspected, the cost specifically being the salaries of the clerks and inspectors (R. 33, 34). This payment was to be made "as an offset" to the Federal expense of the work to the Disbursing Clerk of the United States Department of Agriculture (R. 33), although as a matter of practice the checks were drawn by the Association to the order of the ultimate recipients. Inspection of the merchandise was to be made wherever practicable and the Association or its individual member who was the Receiver of the car inspected received an original and two carbon copies of each certificate issued.

The agreement further provided that since the Association and its members were guaranteeing the expense of the work, the services of the inspectors employed under this agreement should not be available to others at a similar charge, but the Association agreed that any receiver of fruits and vegetables in Greater New York would be admitted to membership on the same terms as its other members (R. 34). The inspectors were to be selected, trained, licensed and supervised by the Bureau of Agricultural Economics and the Federal Supervisor was to approve their salaries and determine their assignments (R. 34). Any complaint with regard to their work was to be made to him and they were not to be interfered with by any member of the Association (R. 34). The Bureau was allowed, if it desired, to advance the money for any of the expenses under the agreement and the reimbursement therefor was to be made by the Association by payment to the Disbursing Clerk of the Department of Agriculture and monthly bills by the Bureau were provided for (R. 35). The agreement as amended was terminable by mutual consent or by thirty days written notice given by either party to the other (R. 36).

The testimony shows that the terms of this agreement were in no way varied and that the parties thereto fulfilled all of its terms. The inspectors and clerks engaged in this work were neither hired, discharged, nor controlled, by the

Association (R. 18), which had no dealings whatsoever with the personnel. The names of the inspectors and clerical workers were only known on the receipt of the payroll forwarded to it by the Bureau (R. 18, 21, 22), and they were responsible only to the United States Government and worked according to its standards and specifications (R. 26). The claimant-petitioner was hired by Mr. Hackleman, the inspector in charge of the New York Bureau of Agricultural Economics (R. 24, 25), she took all orders from him, worked in the office of the Department of Agriculture and never even saw any member of the respondent (R. 22, 23). Her salary was received at the Department office by means of a check drawn by the Association (R. 23). Some deductions were made from her salary for Social Security (R. 23) which were later refunded (R. 30, 31), and there is evidence that the Association carried a Workmen's Compensation Policy covering the inspectors but not the claimant-petitioner (R. 24, 30). She was not subject to the Civil Service or required to belong to any Retirement Fund, nor did she contribute from her salary to any Pension Fund (R. 25). The certificates obtained by the Association were not required by law (R. 17), and, although its President testified that they were of doubtful value, the evidence indicates that they were helpful to the railroads, shippers and receivers or consignees (R. 20, 21, 28-30). The certificates were not, however, relied on by the buyers of the merchandise (R. 31, 32).

The Court of Appeals has on these facts determined that respondent is not the employer of the claimant-petitioner and this decision is sought to be reviewed.

Argument

Summary of the argument:

1. No substantial Federal question is here involved.
2. The decision may be sustained on Non-Federal grounds.

I

No substantial Federal question is here involved.

No right or liability under any Federal statute has here been denied, sustained, or even asserted. That the Court of Appeals never understood any Federal question to be presented is clear.

> "* * * The question presented upon this appeal is whether these employees are entitled to benefits from the unemployment insurance fund established by article 18 of the Labor Law (Cons. Laws, ch. 31), added by chapter 468 of the Laws of 1935, and whether the association is their 'employer' as that term is defined in the statute and is liable for contributions to the fund based upon the salaries of these employees."
>
> *Matter of Perry,* 287 N. Y. 539, 543 (R. 48).

The Referee (R. 8, 9) the Unemployment Insurance Appeal Board (R. 5) the Appellate Division of the Supreme Court (R. 41) understood no other question to be involved. The question being one of local law and of the construction of a State statute, no jurisdiction here exists.

> *J. Bacon & Sons* v. *Martin,* 305 U. S. 380; 83 L. Ed. 233.

The only right asserted by the claimant-petitioner is to unemployment insurance benefits under the law of the State of New York. The only liability of the respondent asserted by the petitioner is for payment of taxes under the same law. It not appearing that any title, right, privilege or immunity under any statute of the United States has been claimed, jurisdiction must be declined.

> *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212, 213; 82 L. Ed. 751, 755;
> *Honeyman* v. *Hanan,* 300 U. S. 14, 18; 81 L. Ed. 476, 479.

The fact that the Court of Appeals in its opinion considered the Perishable Agriculture Commodities Act of 1930 (U. S. C. A., Title VII, Chapter 30A) will not confer jurisdiction, since, if it is the petitioner's contention that the Court's construction of this statute is incorrect and that the Department of Agriculture had no power to hire the claimant-petitioner under this statute, despite its express terms, [7 U. S. C. A., Sec. 499 (o)], such contention is clearly frivolous and without merit.

No conflict exists between the decision of the Court of Appeals and that of any Federal Bureau,* nor is it shown how, if such conflict existed, this would constitute a basis for jurisdiction. In any event no conflict can arise from apparently divergent rulings on the same state of facts where different statutes are applied and it is conceded that there is no conflict between the decision of the Court of Appeals and any Federal Court.

Petitioner relies upon *Denton* v. *Yazoo and Mississippi Valley Railroad Company, et al, respondents,* 284 U. S. 305, and upon *Standard Oil Company of California* v. *Charles G. Johnson, as Treasurer of the State of California,* 86 L. Ed. 1063 (Adv. Ops.), neither of which supports her claim to jurisdiction.

In the *Denton* case the question arose under Federal law by which all railway common carriers were required to transport mail under conditions prescribed by the Postmaster, among them being that the Railroad Company furnish the men. In so far as it held that the petitioner in that case was the employee of and doing the work of the United States, it is in accord with the decision here sought to be reviewed. The *Standard Oil* case involved an

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*The ruling referred to in Petitioner's brief, p. 17 has never been in operation; it was based on the erroneous decision of the Appellate Division and held in abeyance pending the decision of the Court of Appeals.

action for the recovery of gasoline taxes paid on sales to the United States Army Post Exchanges in California. Recovery of the taxes paid was sought and the appeal was granted on the ground that the State statute was repugnant to the Federal Constitution.

II

Ample non-Federal grounds exist to support the decision of the Court of Appeals.

As previously stated, the Court was under no misapprehension that any question existed, other than under Article 18 of the Labor Law, whether respondent was the employer of the claimant-petitioner. The same authorities cited on page 14 of petitioner's brief were advanced to the Court of Appeals in connection with this question and found inapplicable or unpersuasive.

The claimant-petitioner was hired by an Inspector of the United States Department of Agriculture. She performed her work in its office. She reported to, and was supervised by, the inspector in charge. Her working hours, assignments and the manner of execution were determined by the inspector. Her salary was fixed by the Bureau and paid to her at the Bureau office. She was subject to discharge by the Bureau only and was engaged in its business, which was the issuance of Government Inspection Certificates. No control of any nature was exercised over her by the respondent. Under any test the conclusion is inescapable that she was not the employee of the respondent.

Standard Oil Co. v. *Anderson*, 212 U. S. 215; 53 L. Ed. 480;
Irwin v. *Klein*, 271 N. Y. 477;
Matter of Beach v. *Velzy*, 238 N. Y. 100.

Even if the judgment of the court in fact had rested on Federal grounds, the non-Federal grounds adequately support it and jurisdiction fails.

Fox Film Corp. v. *Muller,* 296 U. S. 207; 80 L. Ed. 158.

Conclusion

No substantial Federal question has been shown to be involved here and no grounds have been advanced to justify a review of the decision of the Court of Appeals. The decision is of no general importance, having no operation outside of the State, and its application within the State is confined to this respondent only. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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August, 1942.